MOTION FILED
FEB - 1 1985

(14)

No. 84-468

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF CLEBURNE, TEXAS, *et al.*,
Petitioners,

v.

CLEBURNE LIVING CENTER, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS, AMERICAN PSYCHOLOGICAL ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION, AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, AMERICAN ASSOCIATION OF UNIVERSITY AFFILIATED PROGRAMS FOR THE DEVELOPMENTALLY DISABLED, AND THE COUNCIL FOR EXCEPTIONAL CHILDREN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

JAMES W. ELLIS
Counsel of Record
RUTH A. LUCKASSON
1117 Stanford, NE
Albuquerque, New Mexico 87131
(505) 277-2146
Counsel for Amici Curiae

Of Counsel:

H. RUTHERFORD TURNBULL, III
STANLEY S. HERR
DONALD N. BERSOFF

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-468

CITY OF CLEBURNE, TEXAS, *et al.*,
Petitioners,

v.

CLEBURNE LIVING CENTER, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION OF AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS, AMERICAN PSYCHOLOGICAL ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION, AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, AMERICAN ASSOCIATION OF UNIVERSITY AFFILIATED PROGRAMS FOR THE DEVELOPMENTALLY DISABLED, AND THE COUNCIL FOR EXCEPTIONAL CHILDREN FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 36.3 of the Rules of this Court, the American Association on Mental Deficiency, et al., respectfully move the Court for leave to file a Brief *Amici*

Curiae in the above-entitled case. Counsel for Petitioner has not responded to movants' letter requesting consent, but has informally notified counsel for Respondent that he will not consent to the filing of any *Amicus* briefs in support of Respondents. Counsel for Respondents have granted their consent to the filing of this brief.

Amici are the principal professional organizations for professionals providing habilitation, education, and other services to persons with mental retardation. *Amici* thus have substantial knowledge and experience regarding the history of discrimination against retarded people and the extent to which that discrimination continues to the present day. Each of these issues is relevant to the determination of the appropriate level of judicial scrutiny for statutes that discriminate against mentally retarded people.

The American Association on Mental Deficiency (AAMD) is the Nation's oldest and largest interdisciplinary organization of professionals that works exclusively in the field of mental retardation. Founded in 1876 as "The Association of Medical Officers of American Institutions of Idiotic and Feeble-minded Children," it changed its name in 1906 to "The American Association for the Study of the Feeble-minded," and in 1933 to its current name. For decades, AAMD had among its declared objectives "[t]he segregation of mentally deficient persons for institutional care and training with a permanent segregation of those who cannot make satisfactory social adjustments in the community," and this objective was not removed from the Association's statement of purpose until 1954. Among its current objectives are the development of appropriate community-based services for people who are mentally retarded. AAMD today has nearly 10,000 members from a wide variety of disciplines who work with retarded people in both institutional and community settings.

The Association for Persons with Severe Handicaps (TASH) (formerly the American Association for the Education of the Severely/Profoundly Handicapped) was founded in 1974 to develop, advocate, and implement the provision of educational and habilitative services for severely and profoundly handicapped individuals guaranteed to them through the Education of All Handicapped Children Act, 20 U.S.C. § 1401, et seq., and related federal laws. TASH now has more than five thousand members, who include parents, educators, therapists, doctors, and other professionals. TASH members work on a daily basis in schools and community programs to reverse historic patterns of segregation and exclusion and to see to it that severely disabled people are included in national life. One of TASH's stated objectives is the "rapid termination of living environments and educational/vocational/recreation services that segregate, regiment and isolate persons from the individualized attention and sustained normalized community interactions necessary for maximal growth, development and the enjoyment of life."

The American Psychological Association (APA) is a voluntary nonprofit, scientific, and professional organization with more than 60,000 members. It has been the major association of psychologists in the United States since 1892. The APA's purpose, as reflected in its bylaws, is to "advance psychology as a science and profession, and as a means of promoting human welfare." This case is of special interest to the over 1,000 members of APA's Division on Mental Retardation, as well as the thousands of other APA members who are engaged in scholarly research and the habilitation, education, and training of mentally retarded persons.

The American Psychiatric Association was founded in 1844 and is the Nation's largest organization of qualified doctors of medicine specializing in psychiatry. Over 30,000 of the Nation's approximately 37,000 psychiatrists are members.

The American Orthopsychiatric Association is an interdisciplinary organization of 10,000 members, including psychiatrists, psychologists, social workers, educators and allied professionals concerned with the problems, causes and treatment of mental disabilities.

The American Association of University Affiliated Programs for the Developmentally Disabled is a national organization of university-based research, training, and model demonstration programs in the field of mental retardation. These programs employ professionals who represent all disciplines in the field of mental retardation and, among other activities, provide or assist in the provision of community-based educational, residential and vocational services to people who are mentally retarded.

The Council for Exceptional Children is a national organization in the field of special education whose 50,000 members include teachers of people who are mentally retarded, providers of other community-based services for people who are mentally retarded (such as occupational, physical, and vocational therapy and habilitation), and academicians, trainers and researchers in the field of mental retardation.

Amici believe that the nature of the invidious discrimination against people who are mentally retarded is such that heightened judicial scrutiny is needed, and thus *Amici* believe that the decision of the Fifth Circuit should be affirmed. *Amici* take a position different from that of Respondents in urging that the "rational basis test" of minimal judicial scrutiny should not be employed in this case.

CONCLUSION

For the above-stated reasons, we respectfully urge the Court to grant this motion for leave to file the accompanying *Amici* brief in the present case in support of the Respondent.

Respectfully submitted,

JAMES W. ELLIS
RUTH A. LUCKASSON
1117 Stanford, NE
Albuquerque, New Mexico 87131
Counsel for
American Association on
Mental Deficiency, et al.

TABLE OF CONTENTS

	Page
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. PERSONS WITH MENTAL RETARDATION CONSTITUTE A DISCRETE AND INSULAR MINORITY ENTITLED TO HEIGHTENED SCRUTINY	3
A. Mentally Retarded Persons Comprise a Discrete and Insular Minority	3
B. There Is a Substantial History of Legislation That Invidiously Discriminates Against Retarded People	7
C. Mentally Retarded People Are Still Subjected to Invidious Discrimination	15
D. The Invidious Discrimination Results, In Part, from the Disenfranchisement and Political Powerlessness of Retarded People	18
II. THE FACT THAT MENTAL RETARDATION IS RELEVANT TO SOME LEGITIMATE STATE LEGISLATION DOES NOT PRECLUDE FINDING RETARDED PEOPLE A SEMI-SUSPECT CLASS	19
III. LAWS THAT DISCRIMINATE AGAINST PEOPLE WITH MENTAL RETARDATION SHOULD BE SUBJECTED TO HEIGHTENED JUDICIAL SCRUTINY	23
A. The Rational Basis Test Is an Inadequate Tool for Evaluating the Constitutionality of Statutes Which May Invidiously Discriminate on the Basis of Mental Retardation	23

TABLE OF CONTENTS—Continued

Page

B. Intermediate Scrutiny Is a Particularly Appropriate Method for Distinguishing Laws That Unconstitutionally Discriminate Against Mentally Retarded People from Those Laws That Employ the Classification in a Non-invidious Fashion 25

CONCLUSION 30

APPENDIX A 1a

APPENDIX B 4a

TABLE OF AUTHORITIES

CASES: Page

Ambach v. Norwick, 441 U.S. 68 (1979) 8
Board of Education of Cleveland Heights v. State, 47 Ohio App. 417, 191 N.E. 914 (1934) 24
Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) 11, 24, 29
Buck v. Bell, 274 U.S. 200 (1927) 10, 24
Caban v. Mohammed, 441 U.S. 380 (1979) 27
Califano v. Webster, 430 U.S. 313 (1977) 27
Cleburne Living Center, Inc. v. City of Cleburne, Texas, 735 F.2d 832 (5th Cir. 1984) 5
Craig v. Boren, 429 U.S. 190 (1976) 25, 27
Foley v. Connelie, 435 U.S. 291 (1978) 18
Frontiero v. Richardson, 411 U.S. 677 (1973) 7, 21
Fullilove v. Klutznik, 448 U.S. 448 (1980) 20
Goesaert v. Cleary, 335 U.S. 464 (1948) 12
Heckler v. Mathews, 465 U.S. ——, 104 S. Ct. 1387, 79 L.Ed.2d 645 (1984) 25
In re Griffiths, 413 U.S. 717 (1973) 15, 25, 27
Landon v. Plasencia, 459 U.S. 21 (1982) 14
Lau v. Lau, 81 N.H. 44, 122 A. 345 (1923) 10
Mathews v. Lucas, 427 U.S. 495 (1976) 7, 26
Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981) 20, 27
Mills v. Board of Educ. of District of Columbia, 348 F. Supp. 866 (D.D.C. 1972) 12
Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) 11
Muller v. Oregon, 208 U.S. 412 (1908) 24
North Carolina State Board of Education v. Swann, 402 U.S. 43 (1971) 20
Orr v. Orr, 440 U.S. 190 (1979) 27
Pennsylvania Association of Retarded Children v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), and 343 F. Supp. 279 (E.D. Pa. 1972) 12
Pennhurst State School & Hosp. v. Halderman (I), 451 U.S. 1 (1981) 17
Pennhurst State School & Hosp. v. Halderman (II), —— U.S. ——, 104 S. Ct. 900, 79 L.Ed.2d 67 (1984) 17

TABLE OF AUTHORITIES—Continued

	Page
Pickett v. Brown, —— U.S. ——, 103 S. Ct. 2199, 76 L.Ed.2d 372 (1983)	25
Planned Parenthood Ass'n of Kansas City v. Ashcroft, 462 U.S. ——, 103 S. Ct. 2517, 76 L.Ed.2d 733 (1983)	27
Plessy v. Ferguson, 163 U.S. 537 (1896)	11, 29
Plyler v. Doe, 457 U.S. 202 (1982)	7, 19, 25
Procunier v. Martinez, 416 U.S. 396 (1974)	27
Roberts v. United States Jaycees, 468 U.S. ——, 104 S. Ct. 3244, 82 L.Ed.2d 462 (1984)	27
Rostker v. Goldberg, 453 U.S. 57 (1981)	20, 27
San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973)	7
Schweiker v. Wilson, 450 U.S. 221 (1981)	24
Skinner v. Oklahoma, 316 U.S. 535 (1942)	10
State ex rel. Beattie v. Board of Education, 169 Wis. 231, 172 N.W. 153 (1919)	13
State v. Wyman, 118 Conn. 501, 173 A. 155 (1934)	10
Storer v. Brown, 415 U.S. 724 (1974)	27
Sugarman v. Dougall, 413 U.S. 634 (1973)	18
Toll v. Moreno, 458 U.S. 1 (1982)	18, 20
United States v. Carolene Products, 304 U.S. 144 (1938)	7
United States v. O'Brien, 391 U.S. 367 (1968)	27
U.S. Department of Agriculture v. Moreno, 413 U.S. 528 (1973)	24
Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980)	27
Williamson v. Lee Optical, 348 U.S. 483 (1955)	23
Youngberg v. Romeo, 457 U.S. 307 (1982)	17, 28
Zobel v. Williams, 457 U.S. 55 (1982)	21

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I	27
U.S. Const. amend. XIV	30
Iowa Const. art. 2, § 5	18
N.M. Const. art. XII, § 5	13

TABLE OF AUTHORITIES—Continued

STATUTES: Page

Education for All Handicapped Children Act, 20 U.S.C. § 1400 et seq. (1982) 13, 22
Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6000 et seq. (1982) 22
Section 504 of the Vocational Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982) 22
Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214 (1882) 14
Alaska Stat. § 14.30.045(4) (1982) 13
Act of Mar. 15, 1909, ch. § 1, 1909 N.D. Sess. Laws 317, 317-18, amended by Act of Feb. 23, 1967, ch. 214, § 19, 1967 N.D. Sess. Laws 429, 438..... 12
Act of Mar. 28, 1904, ch. 134, § 1, 1094 N.J. Laws 267, 267-68, repealed by Act of Mar. 5, 1918, ch. 281, § 1, 1918 N.J. Laws 1050, 1059..... 12

LEGISLATIVE MATERIALS:

S. Rep. No. 352, 64th Cong., 1st Sess. 1917, to accompany H.R. 10384, *cited in United States ex rel. Patton v. Tod*, 297 F. 385 (2d Cir. 1924), *cert. dismissed per stip.*, 267 U.S. 607 (1925).... 14

OTHER AUTHORITIES

Books:

American Association on Mental Deficiency, *Classification in Mental Retardation* (H. Grossman ed. 1983) 3, 4
The Association for Persons with Severe Handicaps, *Guidelines for Reporting and Writing About People with Disabilities* (1984) 5
M. Barr, *Mental Defectives: Their History, Treatment and Training* (1913) 8
R. Bogdan & S. Taylor, *Inside Out: Two First-Person Accounts of What It Means to Be Labeled "Mentally Retarded"* (1982) 17
H. Carey, *A Plea for the Sterilization of Certain Defectives, Particularly the Feeble-Minded and Epileptic* (1912) 11

TABLE OF AUTHORITIES—Continued

	Page
A. Cooke, *Alistair Cooke's America* (1976)	14
S. Davies, *Social Control of the Mentally Deficient* (1930)	16
A. Deutsch, *The Mentally Ill in America* (2d ed. 1949)	9
R. Edgerton, *The Cloak of Competence: Stigma in the Lives of the Mentally Retarded* (1967)	17
H. Goddard, *The Kallikak Family* (1912)	6
W. Goodell, *The American Slave Code* (1853)	12
G. Gunther, *Cases and Materials on Constitutional Law* (10th ed. 1980)	24
L. Kanner, *A History of the Care and Study of the Mentally Retarded* (1964)	9
J. Landman, *Human Sterilization* (1932)	10
Lives in Process: Mildly Retarded Adults in a Large City (R. Edgerton ed. 1984)	17
Pennhurst Longitudinal Study, 1979-1983: Fourth Year Summary (Temple Univ. & Human Services Research Inst. Nov. 1933)	17
T. Regan, *The Case for Animal Rights* (1983)	8
D. & S. Rothman, *The Willowbrook Wars* (1984)	17
S. Sarason & J. Doris, *Educational Handicap, Public Policy, and Social History* (1979)	13
R. Scheerenberger, *A History of Mental Retardation* (1983)	8, 9
A. Stone, *Mental Health and Law: A System in Transition* 119 (1975)	5
L. Terman, *The Intelligence of School Children* (1919)	9
L. Terman, *The Measurement of Intelligence* (1916)	6
H.R. Turnbull & A. Turnbull, *Free Appropriate Public Education: Law and Implementation* (1978)	13
P. Tyor & L. Bell, *Caring for the Retarded in America: A History* (1984)	9
P. Williams & B. Shoultz, *We Can Speak for Ourserves: Self Advocacy for Mentally Handicapped People* (1984)	17

TABLE OF AUTHORITIES—Continued

Page

W. Wolfensberger, *The Origin and Nature of Our Institutional Models* (1975) 8

Articles:

Baer, *The Half-Told Story of Baby Jane Doe*, Columbia Journalism Review 35 (Nov./Dec. 1984) 15

Bersoff, *Regarding Psychologists Testily: Legal Regulation of Psychological Assessment in the Public Schools*, 39 Md. L. Rev. 27 (1979) 9

Biklen & Mlinarcik, *Criminal Justice, Mental Retardation and Criminality: A Causal Link?*, in 10 Mental Retardation and Developmental Disabilities 172 (J. Wortis ed. 1978) 16

Bogdan & Taylor, *The Judged, Not the Judges: An Insider's View of Mental Retardation*, 31 American Psychologist 47 (1976) 17

Bohy, *Bullets "Welcome" Home for Retarded*, Detroit News, May 6, 1979 16

Bonner, *Halfway House Upsets Cleveland Park*, Washington Post, Sept. 10, 1981 16

Bredemeier & Evans, *Group Home's Neighbors Change Minds*, Washington Post, June 29, 1984.. 17

Chamberlain, *Current Legislation—Eugenics and Limitations of Marriage*, 9 A.B.A.J. 429 (1923) 10

Cook, *Eugenics or Euthenics*, 37 Ill. L. Rev. 287 (1943) 16

Christensen, *"Not My Block" Reactions Greet Group Homes*, Dayton Daily News, Mar. 18, 1984 16

Dunlap, *Antidotes for Superstitions Concerning Human Heredity*, 51 The Scientific Monthly 221 (1940) 16

Fernald, *The Burden of Feeblemindedness*, 17 J. Psycho-Asthenics 87 (1912) 9, 11

Fernald, *Thirty Years Progress in the Care of the Feebleminded*, 29 J. Psycho-Asthenics 209 (1924) 16

TABLE OF AUTHORITIES—Continued

Page

Finley, *Arson Hits House Planned for Retarded*, Detroit News, Apr. 30, 1982 16

Ford, *Second Home for Retarded Is Set Ablaze*, Detroit Free Press, Dec. 5, 1980 16

Goddard, *The Possibilities of Research as Applied to the Prevention of Feeblemindedness, Proceedings of the National Conference of Charities and Correction* 307 (1915), *cited in* A. Deutsch, *The Mentally Ill in America* 359 (2d ed. 1949) 9

Gould, *Carrie Buck's Daughter*, Natural History 14 (July 1984) 16

Herr, *The New Clients: Legal Services for Mentally Retarded Persons*, 31 Stan. L. Rev. 553 (1979) 19

Information for Authors, 89 Am. J. Ment. Defic. 109 (1984) 5

Johnson, *Discussion on the Care of the Feebleminded and the Epileptic*, in *Proceedings of the National Conference of Charities & Corrections* 410 (1901), *quoted by* Herr, *Civil Rights, Uncivil Asylums, and the Retarded*, 43 U. Cinn. L. Rev. 679 (1974) 15

Keating, *The War Against the Mentally Retarded*, New York (Magazine) 87 (Sept. 17, 1979) 16

Klein & Green, *Levels of Political Knowledge of Mildly Retarded Adults*, 84 Am. J. Ment. Defic. 159 (1979) 18

Levine, *Group Homes for Retarded People Still Facing Community Hostility*, Hartford Courant, Dec. 3, 1984 16

Linn & Bowers, *The Historical Fallacies Behind Legal Prohibitions of Marriages Involving Mentally Retarded Persons—The Eternal Child Grows Up*, 13 Gonzaga L. Rev. 625 (1978) 10

Lusky, *Footnote Redux: A "Carolene Products" Reminiscence*, 82 Colum. L. Rev. 1093 (1982) 6

MacEachron, *Mentally Retarded Offenders: Prevalence and Characteristics*, 84 Am. J. Ment. Defic. 165 (1979) 16

TABLE OF AUTHORITIES—Continued

Page

Murdoch, *The Psychic Treatment of Mental Defectives*, 10 J. Psycho-Asthenics 224 (1906) 15
Murdock, *Sterilization of the Retarded: A Problem or a Solution?*, 62 Calif. L. Rev. 917 (1974) .. 16
Note, *Mental Disability and the Right to Vote*, 88 Yale L.J. 1644 (1979) 18
Note, *The Right of the Mentally Disabled to Marry: A Statutory Evaluation*, 15 J. Fam. L. 463 (1977) 10
Note, *The Suspect Context: A New Suspect Classification Doctrine for the Mentally Handicapped*, 26 Ariz. L. Rev. 205 (1984) 28
Powell, *Carolene Products Revisited*, 82 Colum. L. Rev. 1087 (1982) 7
Roos, *Trends and Issues in Special Education for the Mentally Retarded*, 5 Education & Training of the Mentally Retarded 51 (1970) 13
Seltzer, *Correlates of Community Opposition to Community Residence for Mentally Retarded Persons*, 89 Am. J. Ment. Defic. 1 (1984) 16
Shaman, *Persons Who Are Mentally Retarded: Their Right To Marry and Have Children*, 12 Fam. L.Q. 61 (1978) 10
Will, *The Killings Will Not Stop*, The Washington Post, Apr. 22, 1982, at A29 ..... 4, 15
Woestendiek, *The Deinstitutionalization of Nicholas Romeo*, Inquirer: The Philadelphia Inquirer Magazine, May 27, 1984, at 18 17
Wolfensberger, *The Extermination of Handicapped People in World War II Germany*, 19 Mental Retardation 1 (1981) 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-468

CITY OF CLEBURNE, TEXAS, *et al.*,
Petitioners,

v.

CLEBURNE LIVING CENTER, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS, AMERICAN PSYCHOLOGICAL ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION, AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, AMERICAN ASSOCIATION OF UNIVERSITY AFFILIATED PROGRAMS FOR THE DEVELOPMENTALLY DISABLED, AND THE COUNCIL FOR EXCEPTIONAL CHILDREN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*

Amici curiae are organizations of professionals who provide services to people with mental retardation. For reasons stated in the attached motion, *Amici* have an

interest in eliminating discrimination against retarded people, and thus in heightened judicial scrutiny of discriminatory statutes.

SUMMARY OF ARGUMENT

Claims for heightened judicial scrutiny must be made against the backdrop of the courts' presumption that state laws are constitutional. Departures from that presumption are entertained only when there is sufficient reason to suspect that the laws in question may be invidiously discriminatory. One such departure is the recognition that some "discrete and insular minorities" have been subject to such a history of invidious discriminaton and are so unable to protect their interests because of political powerlessness that heightened judicial solicitude is necessary to protect them from irrational laws based on prejudice. This Court has identified "traditional indicia of suspectness," which, in combination, help identify those groups that need this special judicial protection.

Mentally retarded people share these attributes with the groups that this Court has identified as warranting either strict or intermediate judicial scrutiny. The history of discrimination against retarded people in this country is conceded by *Amicus* United States to be "grotesque." These citizens were deprived of the most fundamental rights because they were erroneously believed to be a "menace" to society and the principal source of immorality, prostitution, and crime. These false stereotypes, and others, survived, in part, because retarded people were deliberately segregated from society. The resulting invidious laws survived, in part, because retarded people were disenfranchised from participating in the political system.

The classification of mental retardation has some legitimate uses in laws aimed at addressing the real needs and disabilities of retarded people. These noninvidious

laws should be upheld by the courts, while debilitating laws based on false stereotypes and prejudice should be found unconstitutional. The "rational basis test" is an inadequate means of identifying laws that invidiously discriminate against retarded people, and this test would give state and lower federal courts insufficient guidance in evaluating future cases of claimed discrimination. The "middle tier" of intermediate scrutiny employed by the Fifth Circuit in this case is a felicitous mechanism for sorting the constitutional from and the unconstitutional in this field. Laws that are not substantially related to an important governmental objective should be invalidated.

ARGUMENT

I. PERSONS WITH MENTAL RETARDATION CONSTITUTE A DISCRETE AND INSULAR MINORITY ENTITLED TO HEIGHTENED SCRUTINY.

A. Mentally Retarded Persons Comprise a Discrete and Insular Minority.

Mentally retarded people are those with a "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." [1] The

---

[1] American Association on Mental Deficiency (AAMD), *Classification in Mental Retardation* 1 (H. Grossman ed. 1983). The AAMD definition is generally accepted by professionals, courts and legislatures. The data contained in the rest of this paragraph are also drawn from the AAMD classification manual.

By definition, persons with mental retardation have "impairments in adaptive behavior" that exist concurrently with their subaverage intellectual functioning.

> Impairments in adaptive behavior are defined as significant limitations in an individual's effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her

etiology of mental retardation is varied, combining environmental, genetic and unknown causes.[2] The degree of disability that affects these individuals also varies, and is generally described by a classification system of

---

age level and cultural group, as determined by clinical assessment and, usually, standardized scales.

Id. at 11.

Adaptive behavior is a term of art, not to be confused with "maladaptive behavior." Maladaptive behavior includes psychiatric and psychological disorders that might be expressed as aggression toward others, aggression toward oneself, malicious destructiveness, and the like. By contrast, impairments in adaptive behavior indicate incompletely developed or inadequate or elementary behaviors that are not as advanced as the person's chronological age would predict. For example, an adult with mild mental retardation may have impairments in adaptive behavior such as an inability to participate effectively in subtle social exchanges, a need for assistance in the purchase of clothing, a need for assistance in travelling to distant towns, an inability to discuss abstract or philosophical concepts, an inability to participate effectively in hobbies requiring complex planning, a need for assistance in handling money, and an inability to handle a demanding job. *Id.* at 207-08. These impairments, together with a low IQ, categorize the individual as mentally retarded. The fact that impairments in adaptive behavior exist does not mean that the person will have maladaptive behavior.

[2] It should be noted that mental retardation is substantially different from mental illness, and that the two conditions are not identical on the key issues of the history of invidious discrimination, immutability, and disenfranchisement. The issue of whether some severely mentally ill people are a quasi-suspect classification is not before the Court in this case.

Mentally retarded people are often described incorrectly as if they "suffered" from a disease.

> Jonathan Will, 10, fourth-grader and Orioles fan (and the best Wiffle-ball hitter in southern Maryland), has Down's syndrome. He does not "suffer from" (as newspapers are wont to say) Down's syndrome. He suffers from nothing, except anxiety about the Orioles' lousy start.

George Will, *The Killing Will Not Stop*, The Washington Post, Apr. 22, 1982, at A29.

four categories: mild, moderate, severe, and profound. Most mentally retarded people are "mildly retarded." (It should be noted that "mildly" retarded people have an intelligence quotient [IQ] between 55 and 70 and thus have a substantial disability; they should not be confused with those who were previously labelled "borderline retarded," who have IQs between 70 and 85 and who are no longer considered by professionals to be mentally retarded.)

Although there is substantial variation among the characteristics and abilities of people with mental retardation,[3] they almost invariably have been treated as a monolithic group by state-supported discrimination.[4]

---

[3] The statute at bar and numerous others use archaic and stigmatizing terms such as "feeble-minded," "fools," "morons," "imbeciles," and "idiots." Dr. Alan Stone, former president of the American Psychiatric Association, has observed that these legal labels are uniquely "odious and . . . invidious." A. Stone, *Mental Health and Law: A System in Transition* 119 (1975). The fact that they remain on the statute books in so many states is indicative of the continuing prejudice retarded people face in legislative bodies.

The terminology in this field is not without difficulty. The Fifth Circuit demonstrated admirable sensitivity in addressing the problems of retarded people, but the term "retardate," which that court employed occasionally, is no longer favored. *The American Journal on Mental Deficiency*'s current statement of "Information for Authors" may provide a useful guide:

> Terminology. The word "retarded" should be used as an adjective rather than as a noun. "Retardate" should be avoided. Because "normal" has multiple meanings, more precise terms, such as "nonretarded" or "intellectually average" are preferred.

89 Am. J. Ment. Defic. 109 (1984). *Accord* The Association for Persons with Severe Handicaps, *Guidelines for Reporting and Writing About People with Disabilities* (1984).

[4] Those instances in which distinctions have been drawn do not support the dissenting opinion (on the issue of rehearing *en banc*) in the Fifth Circuit, 735 F.2d at 834 n.6 (1984), which speculated that mildly retarded individuals may not suffer discrimination. Historically, mildly retarded people were viewed as the greatest

Similarly, the cruel stigma that attaches to being mentally retarded almost never makes distinctions among degrees of retardation. Retarded people of all levels of disability have been isolated from society by exclusion from public schools, denial of fundamental rights, and *de jure* segregation from life in our communities.[5]

This Court has long recognized that certain discrete and insular minorities are entitled to extraordinary judicial solicitude in order to protect them against invidiously discriminatory legislation. Certain attributes of those classes indicate the need for closer scrutiny than is ordinarily employed in cases that do not involve the deprivation of fundamental rights. These attributes include

---

"social menace" and thus were singled out for discriminatory treatment:

> It is safe to predict that in the near future intelligence tests will bring tens of thousands of these high-grade defectives under the surveillance and protection of society. This will ultimately result in curtailing the reproduction of feeblemindedness and in the elimination of an enormous amount of crime, pauperism, and industrial inefficiency. It is hardly necessary to emphasize that the high-grade cases, of the type now so frequently overlooked, are precisely the ones whose guardianship it is most important for the State to assume.

L. Terman, *The Measurement of Intelligence* 6-7 (1916).

> [T]he idiot [severely retarded] is not our greatest problem. He is indeed loathesome; he is somewhat difficult to take care of; nevertheless, he lives his life and is done. He does not continue the race with a line of children like himself. . . . It is the moron [mildly retarded] type that makes for us our greatest problem.

H. Goddard, *The Kallikak Family*, 101-02 (1912).

[5] *See generally* Lusky, *Footnote Redux: A "Carolene Products" Reminiscence*, 82 Colum. L. Rev. 1093, 1105 n.27 (1982): "In my opinion, the phrase 'discrete and insular' applies to groups that are not embraced within the bonds of community kinship but are held at arm's length by the group or groups that possess dominant political and economic power."

immutability,[6] political powerlessness and disenfranchisement, and a history of purposeful unequal treatment or invidious discrimination. *See San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973); *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938). These criteria do not provide a "neat formula for constitutional adjudication," nor do they require judicial intervention on behalf of "any group that loses a legislative battle." Powell, *Carolene Products Revisited*, 82 Colum. L. Rev. 1087, 1090-92 (1982). Rather, the criteria reflect a recognition that some groups that have suffered a history of unequal treatment and are unable to protect themselves in the political arena may be subjected to invidious and irrational legislation based on stereotypical and prejudicial views. Therefore, these criteria, individually and in the aggregate, must be evaluated carefully to determine whether a particular group is entitled to heightened scrutiny of discriminatory laws.

B. There Is a Substantial History of Legislation That Invidiously Discriminates Against Retarded People.

Mentally retarded people have been subjected to unequal treatment, segregation, and even slavery and death

---

[6] The court below correctly found mental retardation to be an immutable characteristic. J.A. at 127.

This Court's cases have also discussed a factor closely related to immutability: the extent to which the individual is innocent of voluntarily selecting the trait. *Mathews v. Lucas*, 427 U.S. 495, 505 (1976). Mentally retarded people certainly fit this description. Similarly, the disability of some retarded individuals may be apparent (visible) to others, and thus increase the likelihood of discriminatory treatment. *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). But *Amici* do not contend that innocence (or visibility) alone are sufficient to warrant heightened scrutiny. *See generally Plyler v. Doe*, 457 U.S. 202, 245 (1982) (Burger, J., dissenting). Rather, this Court's cases teach that each of the traditional indicia of suspectness is a tool in the overall task of recognizing those groups that are likely to be the subject of invidiously discriminatory laws and thus deserving of heightened judicial attention.

throughout world history.[7] In this country, the worst period of legal discrimination began in the late nineteenth century and lasted through the 1930s, with perhaps the greatest excesses occurring in the period just after World War I. *Compare Ambach v. Norwick*, 441 U.S. 68, 82 (1979) (Blackmun, J., dissenting). Mentally retarded people were believed, incorrectly, to be the source of most of the criminality and immorality in our society. Numerous laws sought to eliminate their "evil" influence by removing them from society and by curbing what was believed to be their propensity for sexual excess and the transmission of genetic and social defects to future generations. A leading authority of that era declared:

> The past few years have witnessed a striking awakening of professional and popular consciousness of the widespread prevalence of feeble-mindedness and its influence as a source of wretchedness to the patient himself and to his family, and as a causative factor in the production of crime, prostitution, pauperism,

---

[7] *See, e.g.*, R. Scheerenberger, *A History of Mental Retardation* 94 (1983); M. Barr, *Mental Defectives: Their History, Treatment and Training* 24 (1913).

Invidious discrimination and prejudice against retarded people have not been limited in the past (nor are they limited today) to eugenic fears. Various other false stereotypical attitudes have also produced discrimination and dehumanizing treatment. These include viewing retarded individuals as subhuman organisms, objects of pity, and "eternal children." *See* W. Wolfensberger, *The Origin and Nature of Our Institutional Models* 5-17 (1975). When these attitudes are reflected in legislation, they can prove tragically disabling to the ability of retarded people to achieve to their individual maximum potential.

Particularly odious are the numerous references in the historical literature that compare retarded people with animals. *Id.* at 37 and sources cited therein. Unfortunately, this invidious comparison is still employed. A respected recent philosophical treatise compares the rights of animals to those of "mentally enfeebled" humans. T. Regan, *The Case for Animal Rights* (University of California Press 1983).

> illegitimacy, intemperance and other complex social diseases. . . . The feeble-minded are a parasitic, predatory class, never capable of self-support or of managing their own affairs. The great majority ultimately become public charges in some form. They cause unutterable sorrow at home and are a menace and danger to the community.[8]

Since procreation by mentally retarded people was (erroneously) thought to be the major source of mentally retarded and other "defective" children, denial of the fundamental right[9] to marry was accomplished by legisla-

---

[8] Fernald, *The Burden of Feeblemindedness*, 17 J. Psycho-Asthenics 87, 90 (1912). *Accord* Goddard, *The Possibilities of Research as Applied to the Prevention of Feeblemindedness*, Proceedings of the National Conference of Charities and Correction 307 (1915), *cited in* A. Deutsch, *The Mentally Ill in America* 360 (2d ed. 1949) (the retarded person as a "menace to society and civilization[,] . . . responsible in a large degree for many, if not all, of our social problems."); L. Terman, *The Intelligence of School Children* 132-33 (1919) ("The feebleminded . . . are by definition a burden rather than an asset, not only economically but still more because of their tendencies to become delinquent or criminal. To provide them with costly instruction for a few years, and then turn them loose upon society as soon as they are ripe for reproduction and crime, can hardly be accepted as an ultimate solution of the problem. The only effective way to deal with the hopelessly feeble-minded is by permanent custodial care.").

For numerous other references as well as modern historical analysis on this point, see P. Tyor & L. Bell, *Caring for the Retarded in America: A History* 71 (1984); R. Scheerenberger, *A History of Mental Retardation* 156 (1983); L. Kanner, *A History of the Care and Study of the Mentally Retarded* 85 (1964). *See generally* Bersoff, *Regarding Psychologists Testily: Legal Regulation of Psychological Assessment in the Public Schools*, 39 Md. L. Rev. 27 (1979). A more detailed survey of the literature on this point may be found in the historiographical note in Appendix A.

[9] The history of invidious discrimination is all the more lamentable because so many of the rights denied to retarded people are those recognized as fundamental: marriage, procreation, voting, and, in a somewhat different sense, freedom from physical confinement. *Amici* do not suggest, of course, that a finding that height-

tion in numerous states. Although such limitations are commonly viewed today as protective of those who may be incompetent to consent to marriage, their original purpose was eugenic.[10] This is evidenced by the fact that some of the statutes, rather than declare such marriages voidable, made them criminal offenses.[11] Eugenic origins can also be seen in the fact that several statutes exempted from the prohibition against marriage mentally retarded wo.nen beyond child-bearing age.

Since barriers to marriage could not prevent all mentally retarded people from conceiving and bearing children, states concluded that more drastic measures were necessary. Perhaps the most familiar of these were the eugenic sterilization laws which were enacted by 29 states between 1907 and 1931. J. Landman, *Human Sterilization* 302-03 (1932). The invidious origin of these laws is reflected in this Court's opinion in *Buck v. Bell*, in which retarded citizens, as a monolithic group, were contrasted to our "best" citizens. The former were char-

---

ened scrutiny is warranted in the instant case will change the result in all cases in which retarded people are deprived of these rights, since judicial scrutiny will already be at the highest level when the right involved is fundamental. *See generally Skinner v. Oklahoma*, 316 U.S. 535 (1942).

[10] Chamberlain, *Current Legislation—Eugenics and Limitations of Marriage*, 9 A.B.A.J. 429 (1923). This eugenic purpose is also made explicit in *Lau v. Lau*, 81 N.H. 44, 122 A. 345 (1923). *See also State v. Wyman*, 118 Conn. 501, 173 A. 155 (1934). For a more detailed discussion, see Linn & Bowers, *The Historical Fallacies Behind Legal Prohibitions of Marriages Involving Mentally Retarded Persons—The Eternal Child Grows Up*, 13 Gonzaga L. Rev. 625 (1978). *See generally*, Shaman, *Persons Who Are Mentally Retarded: Their Right To Marry and Have Children*, 12 Fam. L.Q. 61 (1978); Note, *The Right of the Mentally Disabled to Marry: A Statutory Evaluation*, 15 J. Fam. L. 463 (1977).

[11] To avoid cluttering the argument with numerous statutory citations and quotations from discriminatory laws, illustrative examples have been cited and described in Appendix B, Statutory References, which is organized by topic.

acterized as "already sap[ping] the strength of the State," threatening to "swamp [society] with incompetence," and certain to produce "degenerate offspring" who were, in turn, doomed to commit capital crimes. 274 U.S. 200, 207 (1927).[12]

It was believed that even eugenic sterilization would be insufficient to protect society, and thus "eugenic segregation" laws were also enacted.[13] Although it is popularly believed today that mental retardation institutions originated from purely charitable impulses, the historical rec-

---

[12] *Amici* respectfully submit that one rough gauge of the intensity of historical invidious discrimination against a particular group can be found in the stereotypical characterization of that group in judicial opinions from earlier eras. *Compare Buck v. Bell with Plessy v. Ferguson*, 163 U.S. 537 (1896), *and Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873). *See Mississippi University for Women v. Hogan*, 458 U.S. 718, 725 n.10 (1982).

[13] *See, e.g.*, H. Carey, *A Plea for the Sterilization of Certain Defectives, Particularly the Feeble-Minded and Epileptic* 4-5 (1912):

> What shall we do with the feeble-minded and epileptic already existing? One school says vasectomy, another castration, and still another segregation. None of these is correct in whole but in part only. To reach the proper solution of this question both sterilization, in some form or other, and segregation must be carried out, castration or vasectomy being used as adjuncts to segregation, and going hand in hand with it.

Fernald, *The Burden of Feeblemindedness*, 17 J. Psycho-Asthenics 87, 93 (1912):

> [High-grade female imbeciles] are certain to become sexual offenders and to spread venereal disease or to give birth to degenerate children. Their numerous progeny usually become public charges as diseased or neglected children, imbeciles, epileptics, juvenile delinquents or later on as adult paupers or criminals. The segregation of this class should be rapidly extended until all not adequately guarded at home are placed under strict sexual quarantine. Hundreds of known cases of this sort are now at large because the institutions are overcrowded.

For a fuller discussion of the segregation of retarded people, see the brief of *Amici* Association for Retarded Citizens, et al.

ord belies this view. Legislative documents, administrative reports, and professional journals of the period all demanded strict segregation in order to prevent the transmission of "incompetence." [14] This can also be seen in the state laws that explicitly differentiated women of child-bearing years from other proposed inmates of state retardation institutions. Other states provided that parents who had placed their minor children in such "state schools" could not obtain their own children's discharge.[15]

Mentally retarded children were also categorically excluded from public schools.[16] Although much of the his-

---

[14] The fact that segregation laws also recited, and in some cases had, additional charitable purposes does not eliminate their basic invidious character. Gender discrimination has often been supported as "protective" of women, *see, e.g., Goesaert v. Cleary*, 335 U.S. 464 (1948), but where it is based on false stereotypes, it is invidious and unconstitutional. Even nineteenth century American slave codes had some minimal provisions to protect slaves from abuse, but it can hardly be contended that this rendered them any less invidious. W. Goodell, *The American Slave Code* 155-96 (1853).

[15] *See, e.g.*: "That any parent, parents, guardian, or custodian who shall make application to have any person admitted to any of the institutions coming under the provisions of this act shall in such application, waive all right to remove such inmate either permanently or for a limited time . . . ." Enacted by Act of Mar. 28, 1904, ch. 134, § 1, 1904 N.J. Laws 267, 267-68, repealed by Act of Mar. 5, 1918, ch. 281, § 1, 1918 N.J. Laws 1050, 1059. "[A]ny inmate of such institution [for the feeble minded] shall not be removed therefrom, except upon a written request of the parent, parents, guardian or custodian of such inmate, which said request must receive the approval of the superintendent before such inmate can be removed." Enacted by Act of Mar. 15, 1909, ch. 213, § 1, 1909 N.D. Sess. Laws 317, 317-18, amended by Act of Feb. 23, 1967, ch. 214, § 19, 1967 N.D. Sess. Laws 429, 438.

[16] *See Pennsylvania Ass'n for Retarded Children v. Commonwealth of Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972); *Mills v. Board of Educ. of District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972). Congress, upon

torical record on this point recites the false stereotype that these children were ineducable, there are also references to the need to protect nonretarded children from them.[17] This is borne out by the fact that as recently as 1962, only 16 states made retarded children, classified by the state as "educable," subject to mandatory attendance laws.[18]

---

enactment of the Education For All Handicapped Children Act, found that

> (3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;
>
> (4) one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers.

20 U.S.C. § 1400(b) (1982).

Typically, children with handicaps were excluded from the compulsory attendance laws as not having "sufficient physical and mental ability," N.M. Const. art. XII, § 5. *See generally* S. Sarason & J. Doris, *Educational Handicap, Public Policy, and Social History* (1979); H.R. Turnbull & A. Turnbull, *Free Appropriate Public Education: Law and Implementation* 33-84 (1978); Roos, *Trends and Issues in Special Education for the Mentally Retarded*, 5 Education & Training of the Mentally Retarded 51 (1970).

[17] *See, e.g.*, reference to children as having "a physical or mental condition which . . . will cause the attendance of the child to be inimicable to the welfare of other pupils . . . ." Alaska Stat. § 14.30.045(4) (1982). *See generally State ex rel. Beattie v. Board of Education*, 169 Wis. 231, 172 N.W. 153, 154 (1919) (boy with cerebral palsy excluded from school because he "produces a depressing and nauseating effect upon the teachers and school children").

[18] Roos, *Trends and Issues in Special Education for the Mentally Retarded*, 5 Education & Training of the Mentally Retarded 51 (1970).

Fear of retarded people can also be seen in Congress' decision to exclude them from immigration to this country.

> The reasons for excluding a physically defective alien are likelihood of his becoming a public charge and inability by his own exertions to care for himself and those dependent upon him, while the real object of excluding the mentally defective is to prevent the introduction into the country of strains of mental defect that may continue and multiply through succeeding generations, irrespective of the immediate effect thereof on earning capacity. This change was made . . . in line with the well-established public policy of rigidly excluding the mentally deficient.[19]

This ban preceded the national quota system by 40 years.[20] While "our Nation welcomed and drew strength

---

[19] S. Rep. No. 352, 64th Cong., 1st Sess. (1917), to accompany H.R. 10384, *cited in United States ex rel. Patton v. Tod*, 297 F. 385, 395 n.1 (2d Cir. 1924), *cert. dismissed per stip.*, 267 U.S. 607 (1925).

[20] Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214 (1882). *See also* A. Cooke, *Alistair Cooke's America* 282-84 (1976) (describing Ellis Island):

> They moved in single file through a stockyard maze of passageways and under the eye of a doctor in a blue uniform who had in his hand a piece of chalk. He was a tough instant diagnostician. He would look at the hands, the hair, the faces and rap out a few questions. He might spot a panting old man with purple lips, and he would chalk on his back a capital "H" for suspected heart disease. Any facial blotches, a hint of gross eczema brought forth a chalked "F," for facial rash. Children in arms were made to stand down to see if they rated an "L" for the limp of rickets or some other deficiency disease. There was one chalk mark that every family dreaded, for it guaranteed certain deportation. It was a circle with a cross in the middle, and it indicated "feeble-minded."

Although this discrimination is part of a larger pattern of invidious discrimination, a decision by this Court to apply heightened scrutiny to mental retardation classifications would not affect current immigration laws. *See Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

from the immigration of aliens" generally, *In re Griffiths*, 413 U.S. 717, 719 (1973), this welcome was not and is not extended to families with retarded members.

Finally and most drastically, proposals were made that mentally retarded people should be killed in order to prevent the harm they posed to society.[21] Although these proposals appear not to have been formally codified in American law,[22] the lives of retarded people have not been afforded the same protection as those of their fellow citizens.[23]

C. Mentally Retarded People Are Still Subjected to Invidious Discrimination.

If the history of state-supported discrimination had been ended by changes in laws and public attitudes, *Amici*, as professional associations, would have little reason to urge this Court to employ heightened scrutiny. But prejudice, once loosed, is not easily cabined. Uncontroverted scientific evidence long ago debunked the no-

---

[21] *See, e.g.*, reference to proposed Iowa legislation in 1906 for "removal by the chloroform route," and statement that "the two things are in line[:] . . . . the authority of the law to prevent defectives from being born, and the authority of the law to put them out of the world after they are born." Murdoch, *The Psychic Treatment of Mental Defectives*, 10 J. Psycho-Asthenics 224 (1906). *See also* Johnson, *Discussion on the Care of the Feebleminded and the Epileptic*, in *Proceedings of the National Conference of Charities & Corrections* 410-11 (1901), *quoted by* Herr, *Civil Rights, Uncivil Asylums, and the Retarded*, 48 U. Cinn. L. Rev. 679, 697-98 (1974): "I do not think that to prevent the propagation of this class it is necessary to kill them off or to resort to the knife; but, if it is necessary, it should be done."

[22] *Compare* Wolfensberger, *The Extermination of Handicapped People in World War II Germany*, 19 Mental Retardation 1 (1981).

[23] Will, *supra* note 2. Mass media accounts of the current debate regarding newborn babies thought to be mentally retarded often have reflected the view that lives of retarded people have diminished value. *See generally* Baer, *The Half-Told Story of Baby Jane Doe*, Columbia Journalism Review 35 (Nov./Dec. 1984).

tions that mentally retarded people have extraordinary criminal tendencies or pose a eugenic threat of "swamping" society,[24] and there have been strenuous efforts, described by Dr. Roos at trial, to change public attitudes. Nevertheless, public animosity toward retarded people—and especially retarded adults—remains strong.[25] Ac-

---

[24] *See, e.g.*, Biklen & Mlinarcik, *Criminal Justice, Mental Retardation and Criminality: A Causal Link?*, in 10 Mental Retardation and Developmental Disabilities 172, 176 (J. Wortis ed. 1978); MacEachron, *Mentally Retarded Offenders: Prevalence and Characteristics*, 84 Am. J. Ment. Defic. 165, 175 (1979); Murdock, *Sterilization of the Retarded: A Problem or a Solution?*, 62 Calif. L. Rev. 917, 924-28 (1974); Gould, *Carrie Buck's Daughter*, Natural History 14 (July 1984). Voices of caution were heard from the professional community as early as the 1930s, but were not heeded by lawmakers. S. Davies, *Social Control of the Mentally Deficient* 63 (1930); Cook, *Eugenics or Euthenics*, 37 Ill. L. Rev. 287 (1943); Dunlap, *Antidotes for Superstitions Concerning Human Heredity*, 51 The Scientific Monthly 221 (1940): "The Kallikak phantasy has been laughed out of psychology, along with the even more appalling legend of the Nams and the Jukes; but the theories involved in them still linger in popular superstitions . . . ." (For a discussion of the Kallikaks and Jukes, see Appendix A.) Fernald was among the first to have doubts about his earlier alarmist views. Fernald, *Thirty Years Progress in the Care of the Feebleminded*, 29 J. Psycho-Asthenics 209 (1924).

[25] *See, e.g.*, Keating, *The War Against the Mentally Retarded*, New York (Magazine) 87 (Sept. 17, 1979) (describing firebombings, beatings, vandalism and other forms of intimidation in response to proposed group homes for retarded citizens); Levine, *Group Homes for Retarded People Still Facing Community Hostility*, Hartford Courant, Dec. 3, 1984; Finley, *Arson Hits House Planned for Retarded*, Detroit News, Apr. 30, 1982; Ford, *Second Home for Retarded Is Set Ablaze*, Detroit Free Press, Dec. 5, 1980; Bohy, *Bullets "Welcome" Home for Retarded*, Detroit News, May 6, 1979; Christensen, *"Not My Block" Reactions Greet Group Homes*, Dayton Daily News, Mar. 18, 1984; Bonner, *Halfway House Upsets Cleveland Park*, Washington Post, Sept. 10, 1981. *See generally* Seltzer, *Correlates of Community Opposition to Community Residences for Mentally Retarded Persons*, 89 Am. J. Ment. Defic. 1

counts now appearing in the literature by mentally retarded people themselves are particularly persuasive on this issue.[26] The shameful conditions[27] in many retardation institutions bespeak public indifference, at best, to the plight of retarded citizens. This Court was recently put in the remarkable position of having to admonish states that conditions impermissible in the punishment of felons could not be inflicted upon innocent residents of retardation institutions. *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982).

(1984). *See also* D. & S. Rothman, *The Willowbrook Wars* 180-99 (1984) (detailing the parallel to opposition to racial integration and also discussing the role of local politicians).

It is noteworthy that adverse reaction to group homes for mentally retarded people often is reduced after the home is in operation for a period of time. *See* Bredemeier & Evans, *Group Home's Neighbors Change Minds*, Washington Post, June 29, 1984. *Pennhurst Longitudinal Study, 1979-1983: Fourth Year Summary* 13-14 (Temple Univ. & Human Services Research Inst. Nov. 1983).

[26] The classic work in this field is R. Edgerton, *The Cloak of Competence: Stigma in the Lives of the Mentally Retarded* (1967), which found, for example, that former residents of retardation institutions would do almost anything to avoid discovery of the reasons for their institutionalization, including false claims that they had been locked up for crimes. *Id.* at 148-49. Recent works have confirmed Edgerton's observations. *See* Bogdan & Taylor, *The Judged, Not the Judges: An Insider's View of Mental Retardation*, 31 American Psychologist 47 (1976); R. Bogdan & S. Taylor, *Inside Out: Two First-Person Accounts of What It Means to Be Labeled "Mentally Retarded"* (1982); *Lives in Process: Mildly Retarded Adults in a Large City* (R. Edgerton ed. 1984); P. Williams & B. Shoultz, *We Can Speak for Ourselves: Self Advocacy for Mentally Handicapped People* (1984).

[27] *Pennhurst State School & Hosp. v. Halderman (I)*, 451 U.S. 1, 7 (1981); *Pennhurst State School & Hosp. v. Halderman (II)*, —— U.S. ——, 104 S. Ct. 900, 922-23, 79 L.Ed.2d 67, 96 (1984) (Stevens, J., dissenting). For a discussion of the fate of one retarded individual whose mother had the temerity to bring institutional conditions to the attention of this Court, see Woestendiek, *The Deinstitutionalization of Nicholas Romeo*, Inquirer: The Philadelphia Inquirer Magazine, May 27, 1984, at 18.

Perhaps the most persuasive and constitutionally relevant proof that prejudicial discrimination has not been eradicated is the fact that many of the invidious laws described in the previous subsection remain in effect. See Appendix B.

D. The Invidious Discrimination Results, In Part, from the Disenfranchisement and Political Powerlessness of Retarded People.

Citizens with mental retardation have been categorically and systematically denied the right to vote.[28] This disenfranchisement has rendered them a politically powerless group, unable to participate effectively in the political arena and thus protect itself from invidious legislation. Categorical disenfranchisement arbitrarily bars some retarded people from voting who have the mental capacity to exercise the franchise,[29] and thus may be impermissible. But even where selective disenfranchisement is a legitimate response to the incapacity of some individuals to vote, it remains a factor that supports heightened scrutiny.[30]

It has been suggested that the existence of advocates for retarded people means that they no longer possess this characteristic of a discrete and insular minority.

---

[28] Note, *Mental Disability and the Right to Vote*, 88 Yale L.J. 1644 (1979). Most states disqualify people with mental retardation from voting. A typical example is the Iowa Constitution, which states that "[n]o idiot, or insane person, or person convicted of any infamous crime, shall be entitled to the privileges of an elector." Iowa Const. art. 2, § 5.

[29] *See generally* Klein & Green, *Levels of Political Knowledge of Mildly Retarded Adults*, 84 Am. J. Ment. Defic. 159 (1979).

[30] This Court has recognized that the disenfranchisement of aliens is constitutionally legitimate, but that it is still relevant to the ability of that group to fend off invidious legislation. *See Sugarman v. Dougall*, 413 U.S. 634, 648-49 (1973); *Foley v. Connelie*, 435 U.S. 291, 296 (1978); *Toll v. Moreno*, 458 U.S. 1, 23 (1982) (Blackmun, J., concurring).

(Pet. Brief at 21.) Petitioner generously overestimates the political effectiveness of *Amici* professional and voluntary association [31] and ignores the fact that the interests of such advocates may not always be identical to those of retarded people.[32] The state-supported discrimination against retarded people results from their almost total disenfranchisement, and their political powerlessness impedes the remedy of this discrimination.

II. THE FACT THAT MENTAL RETARDATION IS RELEVANT TO SOME LEGITIMATE STATE LEGISLATION DOES NOT PRECLUDE FINDING RETARDED PEOPLE A SEMI-SUSPECT CLASS.

In addition to identifying the traditional indicia of suspectness, this Court has also observed that suspect classifications "tend to be irrelevant to any proper legislative goal." *Plyler v. Doe*, 457 U.S. 202, 217 n.14 (1982). The brief of *Amicus* United States attempts to reify this observation into the touchstone of suspectness and, by extension, semi-suspectness. Neither the decisions of this Court nor a careful analysis of the proper role of heightened scrutiny will support this attribution of all-encompassing importance to the presumptive irrelevance of a classification.

Presumptive irrelevance is essentially a shorthand description of some of the traditional indicia of suspectness; it suggests an inquiry into the likelihood that laws aimed at a particular group are the product of invidious discrimination. Classifications that are predominantly employed in a noninvidious manner will frequently re-

---

[31] *See* Herr, *The New Clients: Legal Services for Mentally Retarded Persons*, 31 Stan. L. Rev. 553, 553-54 (1979).

[32] Petitioner's contention would also mean that the Court should reconsider its rule of heightened scrutiny in race and sex discrimination cases because blacks and women are currently active in the political arena and because federal and state governments have enacted civil rights laws.

veal no sustained history of state-supported discrimination.

No classification that this Court has considered is irrelevant to all legitimate state purposes. Racial classifications used for the purpose of remedying past invidious discrimination or implementing constitutional remedies have been found acceptable. *Fullilove v. Klutznik*, 448 U.S. 448 (1980); *North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971). Similarly, gender has been held relevant to important governmental interests. *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981). "[E]very classification is relevant to some purposes and irrelevant to others." *Toll v. Moreno*, 458 U.S. 1, 42 n.13 (1982) (Rehnquist, J., dissenting). If dispositive weight is to be placed on the presumptive irrelevance of a classification, this truism can lead to the conclusion that all classifications are suspect, or that none are.[33] *Amici* believe that a better approach is to recognize that the indicia do not provide a mechanical test for suspectness and that the existence of some legitimate uses of a particular classification is only one factor to be weighed in determining an appropriate level of judicial review of discriminatory statutes.

---

[33] Just as presumptive irrelevance is not the ultimate issue in denying suspect or semi-suspect classification, so too it is insufficient, standing alone, to justify one. The mere fact of presumptive irrelevance of a trait, in the absence of the traditional indicia of suspectness, will not support heightened scrutiny. Left-handed persons are a minority in our population, and hypothetical laws which might use this trait as a classifying mechanism will seldom be related to rational governmental objectives. But while left-handedness is a largely immutable characteristic, there has not been a history of serious and invidious discrimination against left-handed people, nor are they incapable of fending for themselves in the political arena. Proposals for laws which might treat them unfairly can therefore be entrusted to the legislatures, and should the political system somehow enact them, the rational basis test of minimal judicial scrutiny will suffice to deal with truly irrational uses of the classification.

As this case demonstrates, mental retardation is often unrelated to any legitimate governmental purpose. But it cannot be said that mental retardation is never an appropriate tool of classification in constitutionally acceptable legislation. A plurality of this Court noted as much in *dictum* in *Frontiero v. Richardson*:[34] "[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society." The history of systematic discrimination against retarded persons by the laws of this country, such as school exclusion and eugenic segregation, has made it impossible for many of them to "perform or contribute to society" at the level that their actual ability and personal inclination would otherwise allow. But even for individuals whose natural disability is so severe that it greatly limits their ability to "perform" or "contribute," the protection afforded by the Constitution should not be rationed on the basis of performance, either actual or potential. Performance and contribution to society are the acts of individuals rather than of groups, *see generally Zobel v. Williams*, 457 U.S. 55, 72 n.1 (1982) (O'Connor, J., concurring), and individuals will vary within each group in society. The selection of a level of judicial scrutiny, by contrast, rests upon the like-

---

[34] 411 U.S. 677, 686 (1973). This is the purest of *obiter dicta*, since *Frontiero* was a gender case in which the history of invidious discrimination against mentally retarded people was not (and had never been) before this Court. Perhaps more important, that case preceded the development of a middle tier of intermediate scrutiny for those classes that warranted greater protection than the rational basis test but less than strict scrutiny. The *dictum* in *Frontiero* is best read as stating that gender is seldom related to legitimate governmental objectives because its use often betrays stereotypical views of women and thus impedes their full participation in society.

lihood that individuals will suffer discrimination because of prejudice toward the group to which they belong.

Although mental retardation may be relevant more frequently than gender to legitimate governmental objectives, those laws that employ it invidiously bar retarded citizens from the participation which their individual abilities allow. Eugenic segregation laws and accompanying zoning restrictions like the case at bar are examples.

The disabilities which accompany mental retardation are real, and governments must be allowed to take them into account when this is necessary to further an important governmental objective. For example, the Education for All Handicapped Children Act, 20 U.S.C. § 1400 et seq. (1982); the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6000 et seq. (1982); and Section 504 of the Vocational Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982), all treat mentally retarded people differently from mentally typical people. Each of these federal laws, and their counterparts at the state and local levels, represents a legitimate use of the classification.

Thus, in identifying the constitutionally appropriate level of judicial scrutiny, the Court should recognize that there are legitimate and beneficial uses of the classification of mental retardation and, at the same time, should not lose sight of the likelihood of invidiousness that is suggested by the traditional indicia of suspectness. *Amici* believe that the Fifth Circuit properly struck the balance by selecting the intermediate level of scrutiny that follows from finding retarded people a semi-suspect class. Mental retardation is a legitimate legislative classification where degrees of intelligence and accompanying impairment in adaptive behavior are closely related to an important governmental objective. But the classification is impermissible and invidious where the law contemplates a false and stereotyped view of retarded people (whether as a "menace" or as "eternal children").

III. LAWS THAT DISCRIMINATE AGAINST PEOPLE WITH MENTAL RETARDATION SHOULD BE SUBJECTED TO HEIGHTENED JUDICIAL SCRUTINY.

A. The Rational Basis Test Is an Inadequate Tool for Evaluating the Constitutionality of Statutes Which May Invidiously Discriminate on the Basis of Mental Retardation.

The rational basis test is the most deferential level of scrutiny and is used by this Court to evaluate the constitutionality of legislation when there is no reason to depart from the presumption of constitutionality. This level of scrutiny will typically sustain any proffered (or even hypothesized) rationale that might plausibly justify the statute in question, and will require only the most minimal demonstration of "fit" between the purported rationale and the discriminatory law. *See, e.g., Williamson v. Lee Optical*, 348 U.S. 483 (1955).

Deferential scrutiny is inappropriate for cases involving discrimination against persons with mental retardation because of the history of invidious discrimination and the political powerlessness of the group. As discussed above, these factors have produced laws that greatly disadvantage retarded people based on little more than unfounded stereotypes and unmitigated prejudice. Although some of these laws may be among the very few which can be found unconstitutional even under the rational basis test, many others would survive despite their invidious origin, their illegitimate "actual" purpose, and their harmful impact upon the quintessentially vulnerable individuals who comprise this powerless class.

This is particularly true because even the most harmful of laws that discriminate against retarded people can often be rationalized as having, at least in part, a benign or noninvidious purpose. For example, the original segregation laws often recited as one of their purposes the

care and protection of retarded persons.[35] Total exclusion of retarded children from public schools was typically rationalized on the basis of the state's incorrect presumption that such children could not benefit from education.[36] This situation is similar to that faced by this Court in the area of the discrimination against women, where grossly discriminatory and disabling laws were rationalized as "protective" of the assumed "delicacy" of women. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring); *Muller v. Oregon*, 208 U.S. 412 (1908). This Court responded by abandoning the use of minimal scrutiny when it became clear that many of these laws were invidious in operation and were based on falsely stereotypical and prejudicial attitudes toward the abilities and proper role of women in our society.

It is true that on rare occasions, this Court has employed the rational basis test in a manner that truly scrutinizes the purpose and effect of the legislation in question. *See, e.g., U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973). *Amici* believe that this Court should not employ this approach in the instant case. Such a ruling would give insufficient guidance to state and lower federal courts as to the level of scrutiny to be employed in future cases involving classifications based on mental retardation. *See generally Schweiker v. Wilson*, 450 U.S. 221, 243 n.4 (1981) (Powell, J., dissenting). When this Court has used the rational basis test "with bite," *see* G. Gunther, *Cases and Materials on Constitutional Law* 691 (10th ed. 1980), there has been no indication of when such increased scrutiny is man-

---

[35] Similarly, eugenic sterilization laws could be rationalized as being in the best interest of the retarded individual. *See Buck v. Bell*, 274 U.S. 200, 205-06 (1927). But these laws would not be analyzed today at the level of minimal scrutiny because they involve the fundamental right of procreation. *See supra* note 9.

[36] *See, e.g., Board of Education of Cleveland Heights v. State*, 47 Ohio App. 417, 191 N.E. 914 (1934).

dated.[37] This raises the prospect of lower courts continuing to uphold invidious laws under the truly minimal level of scrutiny. (This would result in a correspondingly increased supervisory burden for this Court in determining whether the scrutiny below was sufficiently close.) This Court has the opportunity to avoid these results by employing intermediate scrutiny in this case by finding persons with mental retardation to be a semi-suspect class.

B. Intermediate Scrutiny Is a Particularly Appropriate Method for Distinguishing Laws That Unconstitutionally Discriminate Against Mentally Retarded People from Those Laws That Employ the Classification in a Noninvidious Fashion.

This Court has described the level of scrutiny in "middle tier" cases variously, but generally, laws analyzed at this level "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976).[38]

---

[37] Even if the formulation of such guidance was possible, it might be seen as the creation of a fourth tier of scrutiny.

[38] *Plyler v. Doe*, 457 U.S. 202, 217-18 (1982) ("furthering a substantial interest of the state"); *Heckler v. Mathews*, 465 U.S. ——, 104 S. Ct. 1387, 1398, 79 L.Ed.2d 646, 660 (1984) ("exceedingly persuasive justification"); *Pickett v. Brown*, —— U.S. ——, 103 S. Ct. 2199, 2209, 76 L.Ed.2d 372, 380 (1983) ("substantially related to a legitimate state interest"). In discussing strict scrutiny, the Court has made clear that "no particular signficance [attaches] to these variations in diction," *In re Griffiths*, 413 U.S. 717, 722 n.9 (1973), but it is not clear whether this is also true of intermediate scrutiny.

If the different "middle-tier" formulations are not identical in operation, the *Craig* test seems particularly well suited to cases involving mental retardation. Requiring "*exceedingly* persuasive justification" (*Heckler*) might lead lower courts to give insufficient deference to legislatures that use retardation as a benign classification in recognition of actual differences between retarded and nonretarded people. On the other hand, requiring only a substantial relationship to a "*legitimate* state interest" (*Pickett*) may be inap-

This test appears well suited to the problems presented by laws that employ the classification of mental retardation because it directs lower courts to strike down laws that lack an important governmental purpose or where the use of the classification is not closely related to such a purpose. But the test also acknowledges that important state objectives will, in some cases, warrant the drawing of legislative distinctions on the basis of mental retardation. Thus, middle tier scrutiny is appropriate for this classification because it will not condone invidious laws merely because a rational purpose can be imagined and some connection to the law hypothesized. Yet at the same time, it will not erect an insurmountable barrier to non-invidious and useful laws that treat retarded people, in appropriate cases, differently from nonretarded people.

Too frequently in the past, fear, ignorance, and prejudice about people who are mentally retarded have led legislative bodies to enact laws that deprive retarded citizens of opportunities which all other citizens enjoy. Too often legislative inertia or the lingering remnants of prejudice prevent the repeal of these laws. And in some cases, the same remnants of prejudice may lead to the passage of new laws which are invidiously discriminatory. A salient characteristic of all these laws is that they will either be unrelated to any important governmental objective, or, if the objective is sufficiently substantial, its connection to differential treatment of people with mental retardation will be tenuous or nonexistent.

---

propriately deferential in retardation cases. Interests such as acquiescing in the objections of a group home's neighbors might be "legitimate" in rational basis cases (e.g., objection to the location of a particular business) but insufficiently "important" to support discrimination against a semi-suspect class of citizens. Also, allowing any "legitimate" interest to suffice would raise the problem of the "opaque" justification of "administrative convenience." *See Mathews v. Lucas*, 427 U.S. 495, 516-17 (1976) (Stevens, J., dissenting).

The case at bar is a good example. The safety and welfare of citizens are important governmental objectives, but there is certainly no close connection to the ban of "feebleminded" individuals from the apartment house district. The objections of neighbors, although they may be legitimate governmental concerns in ordinary zoning cases under the deferential scrutiny of the rational basis test, are insufficient to support exclusion of a suspect or semi-suspect class of people. "Discrimination or segregation for its own sake is not, of course, a constitutionally permissible purpose." *In re Griffiths*, 413 U.S. 717, 722 n.8 (1973).

It will not be difficult to identify important governmental objectives underlying noninvidious laws that employ mental retardation as a classification.[39] The appropriate education of retarded children, the habilitation of

---

[39] The Court has identified "compelling" and "important" governmental interests with surprising frequency. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. ——, 104 S. Ct. 3244, 82 L.Ed.2d 462 (1984) (eradicating discrimination against women); *Craig v. Boren*, 429 U.S. 190 (1976) (traffic safety); *Orr v. Orr*, 440 U.S. 268 (1979) (compensating women for past discrimination); *Caban v. Mohammed*, 441 U.S. 380 (1979) (encouraging adoptions); *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142 (1980) (providing for needy spouses); *Califano v. Webster*, 430 U.S. 313 (1977) (reducing economic disparities caused by past discrimination); *Rostker v. Goldberg*, 453 U.S. 57 (1981) (raising and supporting armies); *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981) (plurality opinion by Rehnquist, J.) (preventing teenage pregnancies); *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 462 U.S. ——, 103 S. Ct. 2517, 76 L.Ed.2d 733 (1983) (protecting the lives of viable fetuses); *Storer v. Brown*, 415 U.S. 724 (1974) (stability of the state's political system). It should also be noted that the Court has also found "important or substantial" governmental interests in employing a somewhat different test in speech cases under the first amendment. *See, e.g., Procunier v. Martinez*, 416 U.S. 396 (1974); *United States v. O'Brien*, 391 U.S. 367 (1968).

Thus, concerns that noninvidious laws beneficial to retarded people will fail middle-tier scrutiny because they lack an important governmental purpose are unwarranted.

retarded adults, the protection of the persons and property of vulnerable individuals in our society, and the eradication of discrimination are certainly among the interests which are weighty enough to satisfy the requirements of intermediate scrutiny.

It seems likely that cases involving mental retardation at the middle tier of judicial analysis will more frequently be decided by the closeness of the "fit" between the government's interest and the discrimination against retarded people.[40] Where, as here, the statute is based on stereotypical and false views of retarded people, the classification is unlikely to be found closely related to any legitimate and important purpose. In contrast, where the statute is grounded in an accurate understanding of mental retardation and its consequences, the classification is likely to be closely connected to the beneficial purpose the legislature sought to address. Of course, legislators are not required to be experts in the field of mental retardation. As with other important areas of governmental activity involving technical or specialized knowledge, legislators who are not motivated by prejudice typically will consult with qualified experts in the field. This Court has made clear that in the field of mental disability law, substantial deference should be granted to states when their actions are based on the professional judgments of mental retardation experts. *See Youngberg v. Romeo*, 457 U.S. 307 (1982). Similarly, where a legislative body has relied upon expert opinion in formulating its laws, it is unlikely to have employed prejudice or stereotypes and to have engaged in invidious discrimination.[41]

---

[40] A survey of the cases in other areas invoking intermediate scrutiny indicates that this is a common attribute of the implementation of this test. *See supra* note 35.

[41] It has been suggested that heightened scrutiny be employed only when the discrimination disadvantages persons with mental retardation. Note, *The Suspect Context: A New Suspect Classification Doctrine for the Mentally Handicapped*, 26 Ariz. L. Rev. 205 (1984). This approach is attractive because it focuses judicial attention on cases in which the classification is most likely to be employed in an invidious fashion. But many uses of the classification are at least facially ambiguous as to whether they are intended to assist and benefit mentally retarded persons. Thus, it may prove cumbersome for the courts to ascribe one of two categories of motivation to the state action before selecting a level of judicial scrutiny. It may prove more convenient to subject all challenged statutes involving retardation to the "important governmental interest" test with the understanding that truly beneficial (and other noninvidious) laws will generally be in furtherance of such interests.

Intermediate scrutiny thus is a felicitous and appropriate mechanism for distinguishing those laws that employ mental retardation as an invidious classification from those that use the classification in a constitutionally permissible fashion.

Amici believe that it is not hyperbole to suggest respectfully that this case presents a juncture for mentally retarded people that is analogous to *Plessy* or *Bradwell*. As in those cases, the Court will be indicating the level of protection that other courts in the future must give to a group which has been the object of pervasive historical discrimination. If this Court were to fail to give clear guidance about the unconstitutionality of invidious discrimination against mentally retarded persons, it could greatly imperil the ability of these most vulnerable citizens to be a part of the life of our community. Our conception of national citizenship must be broad enough to include persons with mental retardation.

CONCLUSION

For the reasons set forth above, *Amici* urge this Court to affirm both the decision of the Fifth Circuit that mentally retarded people are a semi-suspect class and the judgment that the ordinance in question is in violation of the equal protection clause of the fourteenth amendment.

Respectfully submitted,

JAMES W. ELLIS
RUTH A. LUCKASSON
1117 Stanford, NE
Albuquerque, New Mexico 87131
(505) 277-2146
Counsel for Amici Curiae

Of Counsel:

H. RUTHERFORD TURNBULL, III
STANLEY S. HERR
DONALD N. BERSOFF